

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRAD TIDIK,

Defendant-Appellant.

UNPUBLISHED

May 31, 2005

No. 252504

Wayne Circuit Court

LC No. 03-003361-01

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felony nonsupport, MCL 750.165, and sentenced to a term of seventeen to thirty-two months' imprisonment. He appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant's conviction arises from his failure to pay child support in accordance with a 1995 judgment of divorce that required him to pay support of \$95 a week for his two children. It was defendant's position that the support provision in the 1995 divorce judgment was a mere "recommendation," and that the only valid support order was a 1998 income withholding order, which directed that his employer withhold \$20 a week from defendant's income.

Defendant first argues that he was improperly sentenced to a prison term where his minimum sentence range under the statutory sentencing guidelines was zero to seventeen months.¹ We agree.

MCL 769.34(4)(a) provides that where the upper limit of the minimum sentence range is eighteen months or less, "the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections." An intermediate sanction means "probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed." MCL 769.31(b). Here, it is undisputed that the trial court did not state a substantial and

¹ The parties agree that the statutory sentencing guidelines, MCL 769.34 *et seq.*, apply to defendant's sentence.

compelling reason to sentence defendant to prison. Indeed, the court noted that although there were “many reasons to depart from the sentencing guidelines, I do not find in the interest of justice any need to do so.” In the absence of a substantial and compelling reason to depart from the guidelines, the court was required to impose an intermediate sanction, which does not include imprisonment. Therefore, the prosecutor concedes, and we agree, that a prison term was not authorized in this case. Defendant is entitled to resentencing.

Defendant next challenges his conviction for failure to pay child support in accordance with the 1995 divorce judgment. Defendant maintains that the divorce judgment did not constitute a valid support order. We find no merit to this argument.

Defendant previously appealed the divorce judgment. Although this Court remanded for a new custody hearing, the Court did not consider the issue of child support, but instead determined that its decision to remand rendered defendant’s child support issue moot. *Tidik v Tidik*, unpublished opinion per curiam of the Michigan Court of Appeals, issued March 24, 1998 (Docket Nos. 189891, 203301, and 203302), slip op at 2. It appears that a new custody hearing was never held on remand, and it is undisputed that the child support provision in the original divorce judgment was never modified.

Contrary to what defendant suggests, his child support obligations were not affected by the 1996 recommendation of a “domestic relations specialist” that defendant’s child support obligation be reduced to \$11 a week. A hearing referee never adopted that recommendation and instead continued defendant’s child support obligation pursuant to the divorce judgment pending a psychological evaluation. Nor did the 1998 income withholding order reduce defendant’s child support. The income withholding order merely identified the amount that defendant’s employer was required to withhold from defendant’s income; it did not alter the amount of defendant’s child support obligation. Indeed, the order stated that “support in the amount previously ordered” was to continue. For these reasons, we find no merit to defendant’s argument that a valid order requiring him to pay child support did not exist.

Defendant also argues that MCL 750.165 is unconstitutionally vague. Because defendant did not challenge the constitutionality of this statute below, this issue is not preserved and our review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A statute is presumed to be constitutional, and must be construed as constitutional unless its unconstitutionality is clearly apparent. *People v Gregg*, 206 Mich App 208, 210; 520 NW2d 690 (1994). A criminal statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms. *Id.* Defendant, as the party challenging the statute’s constitutionality, has the burden of proving that it is invalid. *Id.* “To be constitutional, a contested statutory phrase must give persons of ordinary intelligence notice of the conduct that will subject them to criminal liability.” *Id.* at 211.

We reject defendant's argument that MCL 750.165 fails to indicate what conduct is prohibited. The statute clearly indicates that a violation occurs when an individual is ordered to pay child support, but "does not pay the support in the amount or at the time stated in the order." As this Court observed in *People v Monaco*, 262 Mich App 596, 606; 686 NW2d 790 (2004), the statute indicates that "[f]ailure to pay can be established in two ways: (1) defendant fails to pay at the *time* stated in the order, *or* (2) in the *amount* stated in the order" (emphasis in the original). Defendant has not met his burden of showing that the statute is unconstitutionally vague.

Defendant next argues that he was improperly denied the right to present a defense of inability to pay. We disagree. As this Court concluded in *People v Adams*, 262 Mich App 89, 97-98; 683 NW2d 729 (2004), MCL 750.165 is a strict liability statute, and inability to pay is not a defense.

Next, defendant argues that a new trial is required because the trial court failed to instruct the jury that a necessary element of felony nonsupport is that the defendant appeared in or received notice by personal service of the action in which the order was issued. Because defendant did not object to this alleged omission at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra* at 766-767; *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

In *Monaco, supra* at 606, this Court identified this notice requirement as an essential element of felony nonsupport. It is undisputed that the trial court did not instruct the jury on this element. The prosecutor contends that *Monaco* incorrectly identified this notice requirement as an element, arguing that it is merely a statutory exception that need not be proven because it is "considered as an allegation that no legal excuse for the doing of the act exists in this particular case." MCL 767.48. We are bound by this Court's decision in *Monaco*, however, and therefore conclude that it was plain error for the trial court to omit this notice requirement when instructing the jury on the elements of felony nonsupport.

However, the error did not affect defendant's substantial rights. Although defendant contested the validity of the divorce judgment, he never contended that he did not have notice of the judgment or support proceedings. Indeed, he testified that he was present at the contested divorce trial, that he was in the courtroom when the decision was entered, and that he was aware of the divorce judgment. Moreover, he had filed numerous challenges to the judgment, including the support order, which he contended was merely a recommendation. Under these circumstances, even assuming that notice is an element of felony nonsupport, the trial court's failure to instruct on this element did not affect defendant's substantial rights. Therefore, this unpreserved issue does not warrant appellate relief.

Next, we reject defendant's argument that the evidence was insufficient to support his conviction. This Court reviews a challenge to the sufficiency of the evidence de novo by reviewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In arguing that the evidence was insufficient to support his conviction because there was no valid support order, defendant merely repeats his earlier arguments challenging the validity of the divorce judgment, which we previously rejected. Further, the fact that income was withheld pursuant to the income withholding order did not establish that defendant complied with his child support obligations, given that the divorce judgment required defendant to pay support of \$95 a week, whereas the income withholding order only required that \$20 a week be withheld from defendant's income. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to conclude that defendant failed to pay court ordered child support, both at the time stated in the order and in the amount stated. *Monaco, supra*.

We also reject defendant's unpreserved argument that the jury's verdict was against the great weight of the evidence. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). The evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the jury's verdict to stand. *Id.* at 218-219.

Defendant also argues, in propria persona, that a new trial is required because the trial judge was not chosen by lot as required by MCR 8.111, but instead was "selected for his bias against persons who are charged with this crime." Because defendant did not raise this issue below, we limit our review to plain error affecting defendant's substantial rights. *Carines, supra*. Defendant has not provided any documentation or identified any record support for his claim that the trial judge was not chosen by lot. Thus, a plain error has not been shown. Similarly, defendant has not overcome the heavy presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Although defendant contends that critical comments by the judge in response to his motion for resentencing reflect that the judge was biased, the record discloses that those comments were directed at the judge's disagreement with the statutory sentencing guidelines legislation; they do not reflect actual personal bias or prejudice against the parties or their attorneys. *Id.* Accordingly, reversal is not warranted.

Defendant also argues, in propria persona, that he was denied the effective assistance of counsel because defense counsel argued a position, i.e., that inability to pay should be a defense to a charged violation of MCL 750.165, which was later squarely rejected by this Court in *Adams, supra*. Because defendant did not raise this issue in a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.*

At the time counsel made his inability-to-pay argument, this Court had not yet addressed the issue in a published decision. Defense counsel relied in large part on this Court's earlier decision in *People v Ditton*, 78 Mich App 610; 261 NW2d 182 (1977), which held that a prior version of MCL 750.165 could be defended by showing an inability to pay. After defendant was convicted, this Court addressed the current version of MCL 750.165 and held that it was a strict liability statute and that inability to pay was not a defense. Although defendant complains that defense counsel was not aware of *Adams*, that decision wasn't issued until May 2004, several months after defendant's September 2003, trial. The fact that this Court ultimately decided the issue in a manner differently to that urged by defense counsel below does not demonstrate that counsel's attempt to argue an inability-to-pay defense was objectively unreasonable. Defendant has not demonstrated that he was denied the effective assistance of counsel.

Defendant also argues that defense counsel was ineffective for failing to argue for a jury instruction that would allow the jury to determine whether the divorce judgment was a valid order. The record discloses that the trial court correctly instructed the jury that recommendations by a referee are not a valid order. Further, the court instructed the jury that the prosecution had the burden of proving that an order was entered in circuit court that required defendant to pay child support. Therefore, we find no merit to this issue.

Finally, we find no merit to defendant's pro se argument that the divorce judgment was superseded by the income withholding order, and that it is impermissible to retroactively modify the income withholding order. MCL 552.603. Defendant's argument rests on the assumption that the income withholding order was itself a support order. It was not. It was merely an order specifying the amount, \$20 a week, that defendant's employer was required to withhold from defendant's income. The order expressly provided that "support in the order previously ordered shall continue." Therefore, we reject this claim of error.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Donald S. Owens

/s/ Karen M. Fort Hood